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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
ERNESTINA G. FLEISCHMAN.

UNITED STATES OF AMERICA,
Petitioner,
v.
HELEN R. BRYAN.

ANSWERING BRIEF TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

Nos. 838, 839

UNITED STATES OF AMERICA,

Petitioner,

v.

ERNESTINA G. FLEISCHMAN.

UNITED STATES OF AMERICA,

Petitioner,

v.

HELEN R. BRYAN.

ANSWERING BRIEF TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Opinions Below

The opinions of the Court of Appeals in reversing respondents' convictions in the United States District Court for the District of Columbia on charges of wilfully making default before a Committee of the House of Representatives are reported at 174 Fed. 2d 519 (F. R. 305) and 174 Fed.

2d 525 (B. R. 71) in the *Fleischman* and *Bryan* cases, respectively.*

Jurisdiction

The judgments of reversal of the Court of Appeals were entered April 8, 1949 (F. R. 314-315; B. R. 72). Upon application of the petitioner, the time to petition for writs of certiorari was extended to June 6, 1949, by Mr. Chief Justice VINSON; thereafter by an order dated June 10, 1949, this Court granted respondents until August 10, 1949, to file their answering briefs to the petitions for certiorari. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b) (2) and 45(a), F. R. Crim. P.

Question Presented

Whether in a prosecution for an alleged wilful refusal to produce records summoned by a Congressional committee the presence of a quorum of that committee at the hearing at which the offense was allegedly committed is a material issue of fact to be determined by the jury.

Statute Involved

Revised Statutes, § 102, as amended, 52 Stat. 942, 2 U. S. C. 192, provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the Two Houses of Congress, or any committee of either House of Congress, willfully

* The records in the *Fleischman* and *Bryan* cases will be designated by the letters "F.R." and "B.R.", respectively.

> makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

Counter-Statement

These are companion cases to that of *Barsky, et al.*, v. *United States*, 167 Fed. 2d 241, cert. den. 334 U. S. 843 (petition for rehearing pending), but were tried separately.* A more detailed statement of some of the facts involved upon the instant petition is found in the petition for certiorari in that case (see *Barsky* Petition, pp. 1-9).

The indictment herein charged respondents with the misdemeanor of personally committing on April 4, 1946 a contempt of the House Committee on Un-American Activities of the House of Representatives (sometimes hereinafter referred to as the "House Committee"). The said alleged contempts arose out of the investigation of the Joint Anti-Fascist Refugee Committee (hereinafter referred to as "JAFRC"), a licensed, unincorporated relief association (B. J. A. 303, 328, 540-3), by the House Committee. Respondent Fleischman is a member of the Executive Board, and respondent Bryan is employed as Executive Secretary of that organization.

On December 4, 1945, the House Committee issued a document which by its terms commanded the Sergeant at Arms to summon the respondent Bryan or Dr. Edward Barsky, the Chairman of the JAFRC Executive Board, to testify before it on December 19th and to produce at that time "all books, records, papers and documents" concern-

* By stipulation of counsel certain of the testimony of the *Barsky* case was admitted herein subject to certain specified objections (F. R. 105, 113, 114 ff; B. R. 22A, 33A, 88A.) References to the *Barsky* record will be hereinafter designated as "B.J.A."

ing JAFRC receipts and disbursements "and all letters, memoranda or communications from, or with, any person or persons outside of the United States" (F. R. 108; see B. J. A. 221-222). Respondent Bryan was served with the aforesaid summons by a clerk of the House Committee on December 14 (B. J. A. 217, 22). On that day she and Dr. Barsky were instructed by a resolution adopted by unspecified and unnamed members of the Executive Board of the JAFRC to advise with counsel and to "take any additional steps necessary and pursue all means to maintain and protect the rights" of the JAFRC "from the unjustified attack" on the JAFRC by the House Committee "which we consider constitutes a threat to democratic procedure in the United States" (Gov. Ex. 9, F. R. 241-2). The respondent Bryan appeared before the House Committee on or about January 24, 1946 but did not produce the summoned records (F. R. 109).

The following day a subpoena to Dr. Barsky was issued by Congressman Wood, as Chairman of the House Committee, to appear on January 30, 1946 to testify and to bring with him all records indicating all contributors to and disbursements by the JAFRC in 1944 and 1945, and all correspondence received and sent by the JAFRC from and to foreign countries (B. J. A. 223-225). This subpoena was served on January 28, 1946 and Dr. Barsky appeared on the adjourned date of February 13, 1946 (F. R. 109, B. J. A. 421-434). Two days prior to his appearance, five members of the Executive Board met* and a resolution was adopted ** reiterating that the JAFRC cannot "be considered Un-American, subversive, or an attack upon the principles of our form of government" and instructing Dr. Barsky not to produce the summoned books and records

* Dr. Barsky, Dr. Jacob Auslander, Mrs. Ruth Leider, Manuel Magana, and Prof. Lyman R. Bradley (F. R. 243).

** The minutes of the meeting indicate that 7 other members of the Board voted in absentia; Howard Fast, Mrs. Marjorie Chodorov, Leverett Gleason, Harry M. Justiz, Mrs. Samuel Kamsly, Mrs. Charlotte Stern and Dr. Jesse Tolmach (F. R. 244).

(Gov. Ex. 10, F. R. 243-4). The respondent Fleischman was not present at that meeting and did not vote on the resolution; and the respondent Bryan, being only an employee, did not, of course, vote.

At the February 13th hearing before the House Committee Dr. Barsky was questioned and testified, but did not produce the summoned books and records (F. R. 109).

Thereafter the House Committee, on March 29, 1946, issued 16 individual mandates addressed to the "Sergeant at Arms", or his "Special Messenger", to summon 16 named persons to appear and testify before the House Committee on April 4, 1946 (F. R. 106-7, 140-1). The parties to be summoned, including respondent Fleischman, comprised all the members of the JAFRC Executive Board except Dr. Barsky and John T. McManus; and the respondent Bryan. Each mandate, in terms, further instructed the Sergeant at Arms to bring with him all books and records of the JAFRC from January 1, 1945 to April 14, 1946 concerning JAFRC receipts and disbursements, and JAFRC correspondence with persons in foreign countries during that same period (F. R. 97, 140-1). Service was made on the respondent Fleischman on March 29, 1946 (F. R. 98), and on the same date the respondent Bryan was served with such a subpoena addressed to the JAFRC (B. R. 31-2A).

Ernestina Fleischman appeared on April 4, was sworn and testified, but she did not produce the records summoned (F. R. 123 ff). None of the other witnesses produced those records (F. R. 110, 142). In explanation of her action, the respondent Fleischman submitted a statement which indicated that Helen Bryan as Executive Secretary of the JAFRC had custody and control of the documents sought and was responsible for the production or non-production thereof (F. R. 125).

Helen Bryan also appeared that day and refused to produce the books and records (F. R. 142). In a written statement which she sent to the Committee she informed the

Committee that she considered that it had no constitutional right to the books and records and that the production thereof would publicize recipients of JAFRC funds and "put in jeopardy the lives of those members of their families who are at the mercy of the Franco dictatorship" (B. J.A. Gov. Ex. 6, pp. 103-105).

The foregoing action of respondents before the House Committee at the hearing of April 4, 1946 is the subject matter of the instant prosecution.

On March 31 of the next year, 1947, respondent Fleischman together with all the members of the JAFRC Executive Board except John T. McManus were indicted by the Grand Jury on two counts: for an alleged conspiracy; and for an alleged contempt, after having been cited by the House of Representatives for their alleged wilful and deliberate refusal to produce the aforementioned books and records. Respondent Bryan was indicted on the substantive count alone (B. R. 1A-2A).

At the outset of the *Fleischman* trial the conspiracy count of the indictment was dismissed in view of the determination upon the *Barsky* trial that there was no evidence to sustain the charge (F. R. 9, 287). Each respondent was convicted of the substantive charge, and was sentenced to imprisonment for three months and fined $500 (F. R. 7; B. R. 19A).

At the trials, the prosecution attempted to show the presence of a quorum at the April 4 hearing (F. R. 144 ff; B. R. 47A ff) and respondents, on cross examination and in their motions, requests, and objections, put in issue the presence of such a quorum. Upon appeal, respondents assigned as error the following Trial Court instruction to the jury in each case: "as a matter of law, that the Committee on Un-American Activities of the House of Representatives was a validly constituted committee of the Congress, and was at the time of the defendant's appearance" (F. R. 283; B. R. 59-60). In the *Fleischman* case, the Court also in-

ructed the jury "that the members of the committee be-
ore whom the defendants appeared, pursuant to the sub-
oenas served on them, constituted a sufficient quorum to
arry on the investigation" (F. R. 283). In the *Bryan* case,
he Court advised counsel that it held as "a matter of law"
hat a quorum was present when the defendant appeared
efore the House Committee (B. R. 62A).

The Court of Appeals for the District of Columbia, one
udge dissenting, reversed each judgment on the ground
hat the presence of a quorum of the House Committee at
he hearing of April 4 was a material question of fact in the
lleged offense and should have been submitted to the jury.*

Argument

Petitioner's principal contention before this Court is
hat respondents had no standing to put in issue the pres-
nce of a quorum of the House Committee at the April 4
earing in that respondents did not suggest the absence of a
uorum at the hearing.** The full answer to this conten-
ion appears in *Christoffel* v. *United States*, 69 S. Ct. 1447,
here a witness charged with the commission of perjury
efore a Congressional committee raised the question of
uorum for the first time upon the prosecution and this
'ourt held:

* Judge EDGERTON, the author of the majority opinion on the quorum ques-
on, further found that since no evidence was produced that respondent
leischman had the power or ability to produce the records subpoenaed, the
rial Court erred in refusing to direct a verdict of acquittal in her case.
ROCTOR and PRETTYMAN, *JJ.*, were of a contrary view on this point and so
he Court of Appeals reversed on the instructions alone.

** In the argument of petitioner it is stated that "at no time was any
uggestion made by them, by any other witnesses, or by their counsel that a
uorum was not present" (p. 10). The foregoing statement is not sustained
y the records in the instant cases. There is no testimony as to what the
ther witnesses did at the hearing in this connection; and so far as counsel is
oncerned the record is plain that he was not in the presence of the House
ommittee during the hearing and was obviously in no position to raise the
oint of quorum (F. R. 146)—indeed, since the House Committee was in
xecutive Session counsel had no way of ascertaining which members of the
ommittee were present while a witness testified.

> ". . . Witnesses in committee hearings cannot be required to be familiar with the complications of parliamentary practice. Even if they are, the power to raise a point of no quorum appears to be limited to members of the committee. . . . In a criminal case affecting the rights of one not a member, the occation of trial is an appropriate one for petitioner to raise the question." *Christoffel* v. *United States*, *supra*, at 1450.

Petitioner further suggests that neither a meeting of the committee nor a quorum thereof is an essential or material element of the offense where the summoned party announces in advance the intention to default (see Petition, p. 8) or where the production of records is sought (*id.*, p. 9).

The novel doctrine of "anticipatory contempt" urged by petitioner is without precedent. For a person who proclaims his intended disobedience of a Congressional subpoena may not be held in contempt unless and until he fails to comply with the subpoena and a threat to refuse to testify before a committee, no matter how widely publicized or how strongly proclaimed, is not contempt until a proper subpoena has been served and the witness has failed to appear before the committee as required. Surely a witness may not be held in contempt if, after being served with a subpoena but before the time for compliance the committee recess indefinitely or is dissolved. And if one or both of the respondents had proclaimed in New York their intent to disobey the subpoena, in the presence of many witnesses, but then actually appeared in Washington before the House Committee at the time and place called for in the subpoena, they could not be in contempt. At the very least a *locus poenitentiae* must be offered them. In any event, if the doctrine of "anticipatory contempt" is ever to be adopted it will have to find its origin in some other case for the evidence here is that neither Bryan nor Fleischman voted on the JAFRC resolutions which preceded the hearing of April

4. Nor did they otherwise announce an intention to defy the subpoena for April 4.

Nor is the materiality of the question of a quorum affected by the circumstance that the subpoenas called for the production of records in connection with the appearance and testimony of respondents before the Committee. The crime with which respondents are charged is defined by statute not by the nature of the information sought. It is therefore decisive that Section 192 of Title 2 U. S. C. proscribes the failure to testify or produce papers "*before . . . any committee of either House of Congress*" (emphasis added). In *Christoffel* v. *United States, supra*, the crime of perjury charged was defined by statute as wilfully testifying falsely "before a competent tribunal" and, accordingly, this Court held that an essential element of the proof of perjury before a Congressional committee was the presence of a quorum of the committee at the time of the charged perjury.

> ". . . An essential part of a procedure which can be said fairly to inflict such a punishment is that all the elements of the crime charged shall be proved beyond a reasonable doubt. An element of the crime charged in the instant indictment is the presence of a competent tribunal . . .
>
> "A tribunal that is not competent is no tribunal, and it is unthinkable that such a body can be the instrument of criminal conviction . . . " (69 S. Ct., 1450).

Similarly, in the cases at bar, the statutory offense is default "before any committee of either House of Congress" and, accordingly, an essential element of the crime is that the default must have occurred before a committee; and since a committee is constituted *qua* committee only if a quorum thereof is present,* the existence of such a quorum is a material element of the offense charged.

* In the Court below, petitioner conceded that the contempt of a committee cannot be committed unless the committee *qua* committee has met (see 174 Fed. 2d. 519, 520).

Moreover, apart from statute, the indictments herein charged that respondents "were summoned to produce before the Congressional Committee on April 4, 1946" certain designated records* (F. R. 5; see also B. R. 2A.) The crime thus charged was not committed or proven unless the alleged default occurred before the House Committee *qua* Committee.** Via the indictment, as by the terms of the statute, the prosecution must prove as a material element of the charged offense the presence of a quorum at the time of the alleged offense.

As a material issue, the question of whether a quorum of the House Committee was present on April 4 was an issue of fact for the jury. *Christoffel* v. *United States*, *supra*; see also *Briggs* v. *United States*, 24 Fed. 2d 961, 962; *Ewing* v. *United States*, 37 Fed. 2d. 287, 288; *Stole* v. *State*, 163 So. 504, 173 Miss. 755; *State* v. *Grodzins*, 9 S. W. (2) 808 (Mo. App.). As the Court below held:

> "A quorum of the Congressional Committee was five members. Whether five members were or were not present was a disputed question of fact. It was a material question, assuming there was evidence that (contrary to her own testimony) the records were in appellant's control. On that assumption, therefore, the question whether a quorum was present should have been submitted to the jury. But the court instructed the jury, over objection, that 'as a matter of law . . . the members of the committee before whom the defendants appeared, pursuant to the subpoenas served on them, constituted a sufficient quorum to carry on the investigation.' We think

* Read literally, the subpoenas here involved are defective writs of seizure addressed to the Sergeant At Arms of the House of Representatives commanding him to bring before the Committee certain records. There was no proof that respondents were in default of the express terms of the subpoenas since the record in both cases is barren of any showing that the Sergeant At Arms or his Special Messenger ever made any demand whatsoever for books and records upon the respondents here to which the latter failed to respond.

** In this view of the question before the Court it is unnecessary to consider or pass upon the power of the House Committee to compel the production of records before its clerk or any person or body other than the House Committee.

this was error. Even if the evidence that a quorum was present had been conclusive the instruction would have been erroneous. In a criminal case 'a judge may not direct a verdict of guilty no matter how conclusive the evidence' nor direct the jury to find a material fact against the defendant" (174 Fed. 2d., 520).

Conclusion

The decision of the Court of Appeals is correct and no conflict of decisions is involved in the question presented. The questions involved have been settled within the last few weeks by this Court. We therefore respectfully submit that this petition for a writ of certiorari should be denied and that the writ be granted only as to those questions presented in the cross-petition to be filed with the Court by respondents herein.

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